

No. 14-0098 BN

## **Findings of Fact**

1. Fogle was licensed by the Board as a registered professional nurse (RN). Her license was current and active at all relevant times.<sup>1</sup>
2. Fogle obtained her practical nursing license (LPN) in 1971, and was licensed as an RN in 1997.
3. At the time of the events discussed herein, Fogle was working in her capacity as an RN for a company called Correctional Medical Services (CMS).
4. Beginning in 2008, Fogle was placed by CMS at the Women's Eastern Reception and Diagnostic Correctional Center (WERDCC) in Vandalia, Missouri, where she worked a shift from 11:30 p.m. to 8:00 a.m. in the prison's infirmary. The infirmary is also known as the transitional care unit (TCU). WERDCC is a women's prison within the Missouri Department of Corrections.
5. On the evening of February 8 - 9, 2011, Fogle reported for work at the TCU at 11:25 p.m. Corrections Officer Leroy Stengel also worked at the TCU that evening, and they shared a desk.
6. As he was required to, Stengel kept a chronological log of all activities at his post during the evening. He was also required to do cell checks at 30-minute intervals during the overnight shift on the TCU.
7. During most of Fogle's shift that evening, there were 12 offenders in the TCU during documented counts. Four additional offenders were permanently housed in the TCU for non-medical reasons and did not require medical assessment, care, or documentation. At least one offender was temporarily placed in the TCU for outcount, which meant she was scheduled to

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<sup>1</sup> Fogle's license expired before the hearing and the Board did not renew her license.

leave the prison or had recently returned to the prison. Outcount offenders could be placed in the TCU for non-medical reasons.

8. There was an institutional floor crew in the infirmary cleaning and waxing the floor on the night in question. This required a change in the normal foot traffic and work flow on the TCU as the floor crew swept, mopped, waxed, and fan-dried all areas of the floor, including the hall down which the offender cells are located and around the desk where computer entries are made. The work of the floor crew made access to that hall more difficult.

9. Four of the cells in the TCU were equipped with video cameras so nursing and security staff could remotely monitor inmate activity in those cells. Each TCU cell was equipped with a call button for offenders to reach a nurse by telephone at any time, and each cell door had a window through which inmates could be observed from the hall.

10. Fogle's supervisor had criticized her for spending too much time with offenders inside their cells. Fogle had been counseled to obtain information from the patient quickly and exit the cell.

11. It was Fogle's practice to allow the inmates to sleep during the overnight shift, only interrupting their rest if medically necessary. She would ask the security officer on duty if any offenders appeared to need her attention upon the officer's return to the desk from making the regular cell checks.

12. The computers in the infirmary are down every morning between approximately 2:00 and 7:00 a.m., which specifically makes the AS/400 unavailable for the input of medical data by the nursing staff.

13. It was Fogle's practice to make contemporaneous handwritten notes regarding the status of her patients as she would encounter them, then to input the data about each patient's care into the "Department of Corrections Medical Accountability Records System Nurse

Encounter Soap Notes” (“the electronic medical record”) when she had the time and ability to do so near the end of her shift.

14. On the night of February 8 – 9, Fogle did not enter any inmate’s room between 12:51 a.m. and 4:42 a.m.

15. On that night Fogle documented in the electronic record for nine different inmates that at 2:00 a.m. they were “resting in bed with eyes closed” and either “resp. even and unlabored” or “no distress.” Ex. A, pages 2-3 to 2-19.<sup>2</sup> For most of those inmates, Fogle also documented at 4:00 a.m., “No change in condition.” *Id.* For three other inmates, she documented, “no change in condition” at 3:00 a.m. *Id.* She documented vital signs for one inmate at midnight, one at 2:00 a.m., and three at 4:00 a.m. *Id.*

### **Conclusions of Law**

We have jurisdiction to hear this case. Sections 335.066.2 and 621.045.<sup>3</sup> The Board bears the burden of proving that Fogle’s license is subject to discipline by a preponderance of the evidence. *See Kerwin v. Mo. Dental Bd.*, 375 S.W.3d 219, 229-30 (Mo. App. W.D. 2012)(dental licensing board demonstrates “cause” to discipline by showing preponderance of evidence). A preponderance of the evidence is evidence showing, as a whole, that “the fact to be proved [is] more probable than not.” *Id.* at 230 (*quoting State Bd. of Nursing v. Berry*, 32 S.W.3d 638, 642 (Mo. App. W.D. 2000)). This Commission must judge the credibility of witnesses, and we have the discretion to believe all, part, or none of the testimony of any witness. *Harrington v. Smarr*, 844 S.W.2d 16, 19 (Mo. App. W.D. 1992).

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<sup>2</sup> Exhibit A contains 17 pages of electronic medical records, each of which contains an inmate’s chart notes, but five of the pages are duplicates.

<sup>3</sup> Statutory references are to RSMo Supp. 2013 unless otherwise noted.

## Evidence

Exhibit A is an affidavit from the Board's executive director with attached records. The affidavit states, *inter alia*, that the executive director is "personally acquainted with the facts herein stated," and that:

3. The fifty-nine (59) pages of records and one (1) compact disk of records are kept by the Board in the regular course of business, and it was the regular course of business of the Board for an employee or representative of the Board with knowledge of the act, event condition [sic], opinion or diagnosis recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time of the act, event, condition, opinion or diagnosis.

Attached to the affidavit is a document titled "DETAILS OF INVESTIGATION." It summarizes interviews with CMS and WERDCC personnel. The investigation is not signed or dated, although pages 52 and 53 contain an attestation by the Board investigator that he reviewed and compiled the unidentified documents. Attached to the investigative report are several exhibits, including the complaint report to the Board. All but the first page – a memo from one CMS supervisor to another – are documents and a video that originated at WERDCC. The remainder of the exhibit is comprised of Fogle's notarized statement and security logs of activity in the TCU at WERDCC. Most of this material is hearsay and much of it is difficult to interpret.

The Board relies primarily on this material to make its case against Fogle. We admitted it into evidence because § 536.070(10)<sup>4</sup> allows for the admission of business records into evidence when a proper foundation is laid. However, most of the Board's purported business records are nothing more than an investigator's narrative and interview summaries offered to prove the truth of matters asserted to the investigator by persons unaffiliated with the Board. These statements were admitted over a hearsay objection by Fogle so they could be reviewed and used for any proper evidentiary purpose, if found by this Commission to be of any probative

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<sup>4</sup>All statutory references are to RSMo Supp. 2013 unless otherwise specified.

value and sufficient weight to be at all persuasive of the issues sought to be proven by the Board. Of these records, we find only that Fogle's own notarized statement and the electronic medical records of her patient assessments that night – which she agreed at the hearing that she made – are reasonably reliable sources of evidence.

The Board also offered the WERDCC security video, purportedly from the evening in question, and showed brief clips from it at the hearing. The video purports to show footage of Fogle's shift and that for a number of hours she did not check on any patients. The video has a time stamp on it that both parties agree is inaccurate. The Board presented no competent evidence from any witness that he or she watched the video in its entirety, and it lacks a proper foundation to demonstrate that it is from the night in question, or that it accurately depicts the times on Fogle's shift that night. Again, we admitted it into evidence as a record of the Board, but we find it to be insufficiently reliable or useful as a record of what transpired on the night in question. We accord it no weight.

#### Cause for Discipline

The Board alleges that there is cause for discipline under § 335.066:<sup>5</sup>

2. The board may cause a complaint to be filed with the administrative hearing commission as provided by chapter 621 against any holder of any certificate of registration or authority, permit or license required by sections 335.011 to 335.096 or any person who has failed to renew or has surrendered his or his certificate of registration or authority, permit or license for any one or any combination of the following causes:

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(5) Incompetency, misconduct, gross negligence, fraud, misrepresentation or dishonesty in the performance of the

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<sup>5</sup> RSMo Supp. 2010. Since the alleged misconduct occurred on February 8-9, 2011, the 2010 supplement contains the statutory provisions governing cause for discipline at the relevant time. The Board appears to have pled the 2012 and 2013 versions of the statute alternatively, but neither is applicable, and the interim renumbering and other changes to the section understandably contributed to Respondent's confusion as to the grounds for discipline being alleged.

functions or duties of any profession licensed or regulated by sections 335.011 to 335.096;

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(12) Violation of any professional trust or confidence[.]

Professional Standards – Subdivision (5)

The Board alleges that Fogle’s conduct during her shift on the night of February 8-9, 2011 constitutes incompetency, misconduct, fraud, and misrepresentation in the performance of her functions and duties as an RN. Incompetency is a general lack of professional ability, or a lack of disposition to use an otherwise sufficient professional ability, to perform in an occupation. *Tendai v. Missouri State Bd. of Reg’n for the Healing Arts*, 161 S.W.3d 358, 369 (Mo. banc 2005), *overruled on other grounds by Albanna v. State Bd. of Registration for Healing Arts*, 293 S.W.3d 423 (Mo. banc 2009). It is a “state of being” showing that a professional is unable or unwilling to function properly in the profession. *Albanna*, 293 S.W.3d at 428 (quoting *Lagud v. Kansas City Bd. of Police Comm’rs*, 136 S.W.3d 786, 791 (Mo. banc 2004)). We cannot judge Fogle’s professional ability or her lack of disposition to use that ability from the events of one night. We do not find she was incompetent.

Misconduct means “the willful doing of an act with a wrongful intention[.] intentional wrongdoing.” *Missouri Bd. for Arch’ts, Prof’l Eng’rs & Land Surv’rs v. Duncan*, No. AR-84-0239 (Mo. Admin. Hearing Comm’n Nov. 15, 1985) at 125, *aff’d*, 744 S.W.2d 524 (Mo. App. E.D. 1988). A “misrepresentation” is a falsehood or untruth made with the intent of deceit rather than an inadvertent mistake.” *Hernandez v. State Bd. of Registration for the Healing Arts*, 936 S.W. 2d 894, 899, n. 3 (Mo. App. W.D. 1997). Fraud is “generally under the common law as an intentional perversion of truth to induce another, or to act in reliance upon it.” *Id.* at 899 n.2. It necessarily includes dishonesty, which is a lack of integrity or a disposition to defraud or

deceive. WEBSTER'S THIRD INTERNATIONAL DICTIONARY 650 (unabr. 1986).

Fogle testified that she was told to chart patient assessments as 12:00, 2:00, 4:00 and 6:00, but that times did not need to be exact. Thus, her 2:00 entry into a patient's electronic medical record could include anything that happened between 12:00 and 2:00. She also said she asked officers making their rounds to check on people, and that after she made her initial rounds she had other duties to perform, and she thinks the patients need their sleep. She believes she provided appropriate care to the offenders on the TCU on the night in question.

We believe Fogle's testimony as described above, and that she believes she adequately fulfilled her duties as a nurse on the night in question. Nonetheless, medical records should accurately reflect the conditions of patients and the actions of medical professionals. Fogle's entries into the electronic medical record on the night of February 8 – 9, 2011, did neither. It is possible she could have assessed four of twelve patients by video camera – but that leaves eight patients she did not see at or near 2:00 a.m., when she documented that they were resting in bed with eyes closed and unlabored respiration. It is also possible that she took three patients' vital signs after 4:42 a.m. but documented them at 4:00 a.m. But she documented vital signs for one patient at 2:00 a.m., and the record indicates that she entered no patient's room between 12:51 a.m. and 4:42 a.m. A preponderance of the evidence indicates that she made entries into patients' medical records that were either false or misleading.

We find that when Fogle made entries in the electronic medical records of patients between 12:51 a.m. and 4:42 a.m. that indicated she had observed their respiration or taken their vital signs when she had not, she committed misconduct, made misrepresentations, and was dishonest. We cannot go so far as to conclude that her conduct was fraudulent because it is

unclear that she intended others to act in reliance on her false entries. We find that Fogle is subject to discipline under § 335.066(5).

#### Professional Trust – Subdivision (12)

The phrase “professional trust or confidence” is not defined in Chapter 335. Nor has the phrase been defined in case law. Absent a statutory definition, the plain meaning of words used in a statute, as found in the dictionary, is typically relied on. *E&B Granite, Inc. v. Dir. of Revenue*, 331 S.W.3d 314, 318 (Mo. banc 2011). The dictionary definition of “professional” is

of, relating to, or characteristic of a profession or calling...[:]...  
engaged in one of the learned professions or in an occupation  
requiring a high level of training and proficiency...[:;  
and]...characterized or conforming to the technical or ethical  
standards of a profession or occupation....

WEBSTER’S THIRD NEW INT’L DICTIONARY UNABRIDGED 1811 (1986). “Trust” is

assured reliance on some person or thing [:] a confident  
dependence on the character, ability, strength, or truth of someone  
or something...[.]

*Id.* at 2456. “Confidence” is a synonym for “trust.” *Id.* at 475 and 2456. Trust “implies an assured attitude toward another which may rest on blended evidence of experience and more subjective grounds such as knowledge, affection, admiration, respect, or reverence[.]” *Id.* at 2456. Confidence “may indicate a feeling of sureness about another that is based on experience and evidence without strong effect of the subjective[.]” *Id.* Therefore, we define professional trust or confidence to mean reliance on the special knowledge and skills that professional licensure evidences.

Patients, colleagues, and supervisors – in this case, including officials at WERDCC and CMS – have the right to rely on nurses to accurately document patients’ medical status. When Fogle made entries that reflected patient status that she had not actually assessed, she breached their trust.

Fogle is subject to discipline under § 335.066.2(12).

**Summary**

Fogle is subject to discipline under s 335.066.2(5) and (12).

SO ORDERED on February 13, 2015.

/s/ Karen A. Winn  
KAREN A. WINN  
Commissioner